Committee on Resources

Witness Statement

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Before the Committee on Resources,

U.S. House of Representatives

on

The Collection of State Transaction Taxes

by Tribal Retail Enterprises

October 12, 1999

Good morning, Mr. Chairman and Members of the Committee. I am pleased to offer the views of the Department concerning the collection of state transaction taxes relating to cigarettes and motor fuels by retail enterprises operating on lands held in trust for Indian tribes.

The Department has opposed several appropriations riders and provided testimony opposing earlier legislative solutions put forward that would have undermined this country's obligations to Indian tribes under the federal trust responsibility. I will explain later how such measures would infringe upon tribal sovereignty, thwart the longstanding federal policy of promoting tribal economic self-sufficiency, and undermine ongoing efforts of tribes and states to negotiate joint taxation agreements to accommodate the needs of both parties.

As an initial matter, satisfactory procedures exist today to address the concerns of states, tribes, and the federal government about the collection of state transaction taxes. Sweeping legislative solutions are therefore unnecessary.

Under current regulations governing the trust application process, 25 C.F.R. Part 151, the Secretary of the Interior is required to consult state and local governments prior to making a determination to take lands into trust for Indian tribes. The Secretary examines several factors, one of which is the impact of removing currently unrestricted fee land from state and local government tax rolls. Following a final administrative decision to take land into trust, all interested parties, including states and local governments, have the right to file an action in Federal court to prevent a trust acquisition if they disagree with this decision.

Nearly 20 states have passed legislation consistent with Supreme Court decisions regarding the collection of

state taxes on goods destined for sale to non-Indians before they are sold on Indian lands. In addition, the Federal Highway Administration reported in March 1998 that many states, including Oklahoma, California, Michigan, New York, and Wisconsin, have passed motor fuel tax legislation requiring that state gas taxes be collected at the terminal/rack level or higher instead of at the wholesale level as reported. The State of Washington passed legislation that moved the incidence of the tax from the distributor to the terminal/rack level as of January 1, 1999. State taxes on motor fuels assessed at the terminal/rack level or higher cannot be avoided by any retailer.

In addition to these existing procedures, many states and tribes have negotiated compacts about the collection of taxes. According to the 1995 Arizona Legislative Council Report, at least 18 different states, including Oklahoma, Washington, and Wisconsin, have entered into agreements with over 200 different tribes. These agreements range from state sales tax agreements, such as in the State of Nevada where tribes collect a tribal tax that is equivalent to or higher than the state and local excise taxes and in the State of Wisconsin where state-tribal tax agreements provide tribes with a share of the taxes paid on purchases of tax-paid cigarettes sold by tribes. Other examples include the State of Oklahoma which has 17 motor fuel compacts and 30 tobacco compacts with the 37 tribes in the state and the State of Washington which has four fuel compacts with tribes and a cigarette allocation program in which 21 of the 27 tribes in the state participate. The Administration strongly supports voluntary government-to-government negotiations that result in state-tribal tax agreements that accommodate the needs and rights of each party.

Legislation would present several problems. Congress must recognize that the transfer of trust land is not just the acquisition of land into trust. Indian lands constantly lose trust status and are returned to the state and local tax base. For example, in 1996, 136,607 acres lost trust status, and approximately 5,900 acres were returned to state and local taxing jurisdictions in 1997. Indian trust lands become subject to state and local taxes due to sales to non-Indians, individual Indians taking a patent-in-fee on their land, foreclosures on mortgages of trust land, and probates where non-Indians who are not entitled to hold land in trust have inherited trust land by law or devise. Every year, some amount of trust land will lose its trust status. Tribes who want to replenish the acreage lost should not be penalized and forced to treat any business on newly acquired trust lands differently from those on land currently held in trust.

In 1997 approximately 45,000 acres were acquired into trust. The total increase in the trust land base by tribes between 1985 and 1996 was approximately five percent. This is a small fraction of the 90 million acres lost by Indian tribes between 1887 and the passage of the IRA in 1934. At the present rate of trust land acquisition, it would take the Secretary almost 500 years to restore to tribes the lands they lost during this period.

Further, legislation would undermine the Secretary's authority by granting state and local governments final control -- essentially a veto -- over the Secretary's decision whether to place land into trust. Tribes wanting to restore their land base would be forced to rely on the goodwill of state and local governments whose taxes are at stake because earlier legislative proposals provided no remedy to a tribe if a state or local government refused to negotiate a tax agreement in good faith. After the decision in Seminole, states cannot be compelled to negotiate agreements with tribes. There, state and local governments would have ultimate authority over decisions affecting tribal economic development and self-governance activities unless there were a means for Indian tribes to require states to negotiate on the issue.

Indian law principles, derived from Supreme Court rulings, do not sanction the collection of taxes where the legal incidence of the tax falls on a tribe or tribal members. Moreover, it is a departure from Indian law principles to require the collection of state excise taxes on transactions involving reservation-generated

value from those products manufactured on the reservation.

In closing, I want to note that Indian tribes have the same responsibilities for providing services to their communities as state and local governments have. Any legislation that seeks to remedy purported losses of tax revenues from states and local communities to tribal governments must also consider the benefits that neighboring governments receive from tribal members. Because most tribal communities do not have a comprehensive economic structure, tribal dollars are spent mainly in non-Indian communities where they support the tax base of these neighboring local governments.

We continue to recommend that Congress engage in a comprehensive study that examines first, the actual amount of state and local tax revenues lost to tribes excluding state and local taxes from which tribal members are exempt (or that states have waived as part of a state-tribal agreement), and second, the tax benefits that state and local governments receive as a result of tribal dollars spent outside tribal lands. This study should include information concerning the amount of land removed from state and local tax rolls to benefit tax-exempt organizations such as schools and churches and, ways land may also be removed from tax rolls by state and local governments to encourage local economic development.

I will be happy to answer any questions you may have.

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